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[redacted]
ATTORNEY GENERAL

January 10, 1979

Mr. Ted Williams
Deputy Director
Department of Health Services
1740 West Adams
Phoenix, Arizona 85007

Re: I79-10 (R77-329)

Dear Mr. Williams:

Your letter of October 4, 1977, presents three questions relating to your administration of the certificate of need program.

First, you have asked this office to interpret A.R.S. § 36-433.C.(10), (requiring all health facility applicants to conform to the local health plans adopted by the local authorized agency) in light of A.R.S. § 36-433.01.C, which states that an application for construction of a nursing care or residential care institution shall not be deemed incomplete or denied solely on the basis that the application does not conform to the local bed need plan. Since A.R.S. § 36-433.01.C affects only nursing and residential care institutions, while A.R.S. § 36-433.C (10) applies to all health care institutions,[1] it is obvious that the Legislature intended to exempt nursing care and residential care facilities from the bed need portion of the local plan.

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[1] A.R.S. § 36-401.11 provides: "'Health care institution' means every place, institution, building or agency, whether organized for profit or not, which provides facilities with medical services, nursing services, health-related services of supervisory care services."

You have also asked whether an "authorized local agency," as defined in A.R.S. § 36-401.2, is a "public agency" for the purpose of intergovernmental agreements and contracts under A.R.S. § 11-951 et seq. The term "public agency" is defined by A.R.S. § 11-951 for the purpose of intergovernmental agreements and contracts as:

> . . . the federal government or any federal department or agency, Indian tribal council, the state, all departments, agencies, boards and commissions of the state, counties, school districts, cities, towns, all municipal corporations, and any other political subdivisions of the state or an adjoining state.

Thus, a public agency must be a unit of the federal, state or tribal governments; it cannot be a private organization.

A.R.S. § 36-401, paragraph 3, defines "authorized local agency" to mean: " . . . a local health planning agency recognized by the department of health services or where no such recognized health planning agency exists, [it] means the state health planning advisory council." This statute indicates that except in the few instances where the State Health Planning Advisory Council acts as the local authorized planning agency, the Director of the Department of Health Services must designate an organization to act in that capacity. It is our understanding that all of the agencies currently serving as local health planning agencies are private nonprofit corporation. We are also advised that these agencies, together with the Navajo Tribe, are designated (conditionally) by the United States Department of Health, Education and Welfare as health systems agencies pursuant to 42 C.F.R. 122 and, in that capacity, perform certain functions prescribed by statutes and regulations.[2] See A.R.S. §§ 36-443 et seq. and 36-436.03 and A.C.R.R. Title 9, Chapters 9 and 11.

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[2] Each authorized local agency contracts with the Department of Health Services to perform the state and federal functions in return for state and federal funds made available to the Department of Health Services for such purposes.

Consequently, we must determine whether federal designation or department recognition in itself confers status as a public agency within the meaning of A.R.S. § 11-951. Federal designation does not purport to establish health systems agencies as agencies of the state or federal governments. The principal thrust of the National Health Planning Act of 1974 (P.L. 93-641) was to encourage the establishment of local organizations of health service providers and consumers to plan the health services needed in their area and to provide a local organization which could react to proposals. The federal act did not contemplate the local agencies serving as units of the federal government.

Departmental recognition also does not affect the status of local planning agencies for purposes of A.R.S. § 11-951. Certain state statutes provide that quasi-governmental functions are to be performed by the authorized local agency (see A.R.S. §§ 36-433 and 36-433.01), and its members and employees are subject to the same conflict of interest statutes as are public officers and employees (see A.R.S. § 36-433.01D), but these facts are not decisive on the issue of whether local authorized agencies are units of state government. For the reasons outlined below, it appears that the local authorized agencies cannot be considered state agencies.

Three significant factors suggest that the local agencies do not have state agency status. First, the state does not provide the majority of the authorized agencies' funding nor does it exercise fiscal or budgetary control over those organizations. Additionally, individuals who work for the local authorized agencies are not state employees. Officers and employees of the local authorized agencies are not subject to the state retirement system, salary plan, or state personnel regulations. Those who work for the local authorized agencies are mainly consumer and provider volunteers. Finally, unlike state agencies, the local authorized agencies lack statewide jurisdiction. Where an organization lacks these characteristics, the courts have held that it cannot be considered a state agency. Kentucky Region Eight v. Commonwelth, 507 S.W.2d 489 (Ky 1974); Southeastern Transit Auth. v. Kohn, 18 Pa. Commw. Ct. 546, 336 A.2d 904 (1975); City of Providence v. Int'l. Assn. of Firemen, 305 A.2d 93 (R.I. 1973). Absent these other indicia of state agency status, mere recognition of a private organization as a local authorized agency cannot cause the entity to become a state governmental unit for purposes of A.R.S. 11-951.

Your final question concerns the appropriate standard of review to be applied by the Director of the Arizona Department of Health Services where an applicant has requested review of the local agency's findings. The applicable statute is A.R.S. § 36-443.02, which states in part:

> A. The director shall adopt the findings of the authorized local agency on the application for certificate of need unless the applicant files, within thirty days after receipt of the authorized local agency's finding, with the director a written request for review of such findings, or the director finds that such findings are arbitrary, capricious or not supported by any substantial evidence in which event the director may modify or substitute such findings. The findings issued by the director shall state the basis for his decision. A copy of the director's findings and decision shall be mailed to the applicant. Any application returned to the authorized local agency for further review shall be processed in the same manner as a new application.

The statute indicates that when a review is not requested by the applicant, the findings of the authorized local agency must be adopted by the Director unless the local agency's findings are determined to be arbitrary, capricious or not supported by substantial evidence. The Director, therefore, has an affirmative duty to examine all local agency findings and assure that they are supported by the record. The Director must determine that there is sufficient, competent evidence to sustain the local agency's findings and that the findings were not arrived at arbitrarily or capriciously. See O'Neil v. Pallot, 257 So.2d 591 (Fla. 1972); Naranja Rock Co. v. Dawal Farms, 74 So.2d 282 (Fla. 1954).

However, the statute's use of the disjunctive "or" when discussing the Director's appellate authority could be construed as suggesting that other standards might apply where the applicant requests review. The phrase could suggest that in the latter situation the Director might be authorized to

draw conclusions from the material reflected in the record and adopt findings which are different from those adopted by the local agency, although the local findings are neither arbitrary nor capricious and are supported by substantial evidence.[3]

Whether the Director is authorized, when reviewing local agency findings at the request of the applicant, to modify or substitute findings based on his or her own evaluation of the facts presented in the record of a separate administrative agency, is a question that has never been addressed by the Arizona courts. Nevertheless, other courts have indicated that, where the person or agency which conducts the hearing is organizationally separate from the reviewing authority, the findings of the hearing body must be upheld if they are supported by substantial evidence and are not arbitrary or capricious. See O'Neil v. Pallot, 257 So.2d 59 (Fla. 1972). Cf. State ex rel Broadway Petroleum Corp. v. City of Elyria, 18 Ohio St.2d 23, 247 N.E.2d 471 (1969). If the findings are supported, the reviewing authority is limited to modifying the findings to the extent necessary to correct grammatical errors and errors as to form.

As discussed above, the authorized local agency, although initially designated by the Department of Health Services, is a separate private organization except in the few instances where the State Health Planning Advisory Council has been designated to serve as the local agency. It is our opinion, therefore, that, when performing a "requested" review, the Director must utilize the same standards for reviewing local agency findings as when no review is requested, and must adopt the findings of the authorized local agency unless such are found to be arbitrary, capricious or not supported by substantial evidence. Moreover, we adhere to this opinion even in those situations where the State Health Planning Advisory Council is serving as the authorized local agency in order to promote uniformity of administrative practice.

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[3] The Director is not in either of the above circumstances authorized to elicit additional evidence. The function of the Director is to review the local findings; in so doing, the Director is limited to the facts disclosed in the record made at the public hearing held by the authorized local agency. See O'Neil v. Pallot, 257 So.2d 591 (Fla. 1972); United States Casualty Co. v. Maryland Casualty Co., 55 So.2d 741 (Fla. 1951); Babcock v. Foley, 308 Mich 412, 14 N.W.2d 48 (1944).

Our conclusion is that a request for a review makes essentially no difference in the standard of review to be applied by the Director. The difference lies only in the manner in which the review is performed. If no review is requested, the Director performs the review with only the assistance of departmental staff. If a review is requested, the Director may entertain written or oral arguments from the parties in interest--a procedure which may assist in bringing to light defects in the local agency's findings as well as amplifying the record which would be available for examination if judicial review is requested. Only if the Director finds the local agency's findings to be arbitrary, capricious or based on insufficient evidence may the Director modify those findings or substitute his or her own determination for that of the local authorized agency.

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General

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